

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**T.V., Appellant**

**and**

**U.S. POSTAL SERVICE, ROSSLAND POST  
OFFICE, Chicago, IL, Employer**

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**Docket No. 10-2051  
Issued: May 20, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 10, 2010 appellant filed a timely appeal from a June 18, 2010 decision of the Office of Workers' Compensation Programs denying his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days has elapsed from the last merit decision dated April 29, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3. The only decision properly before the Board is the June 18, 2010 nonmerit decision denying his request for reconsideration.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

On appeal, appellant argued that the Office did not consider the evidence submitted in support of his reconsideration request.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 17, 2006 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that he developed lower back pain due to handling heavy packages, trays of letters and bundles of magazines aggravated his herniated disc and pinched nerve. He stated that he first became aware of his condition on October 19, 2004 and first attributed the condition to his employment duties on October 13, 2005. Appellant submitted a magnetic resonance imaging (MRI) scan dated October 19, 2004, which demonstrated a disc herniation at L5-S1. By decision dated April 24, 2007, the Office accepted his claim for aggravation of displacement of lumbar intervertebral disc without myelopathy.

Appellant filed a claim for compensation requesting wage-loss compensation intermittently from January 8, 2005 through December 20, 2007 on July 7, 2008. In support of his claim, he submitted a series of notes from Dr. Jerome Anthony, an internist, indicating that appellant was totally disabled due to lumbar radiculopathy beginning January 2005 and intermittently through December 10, 2006. Dr. Anthony further found that appellant was disabled intermittent from January 26 through December 11, 2007.

In a letter dated January 13, 2009, the Office requested that appellant obtain additional medical evidence addressing his disability noting that his date of injury was October 13, 2005. In a report dated March 9, 2009, Dr. Harold Pye, a physician specializing in occupational medicine, stated that he first examined appellant in November 2005 for complaints of severe thoracic/lumbar pain. He noted appellant's history of employment duties resulting in the 2005 occupational disease claim and stated that appellant had a prior claim for lumbar injury in 2004, which the Office accepted for lumbar sprain, despite MRI scan evidence of a herniated disc at L5-S1 dated October 19, 2004. Dr. Pye stated that in November 2005 he placed appellant on work restrictions due to the disc herniation and that he found that appellant was totally disabled from November through December 2005 for participation in aggressive physical therapy. He stated, "[Appellant] has continued to experience episodic flare-ups of radicular pain that has resulted in temporary total incapacity several times a year.... I have treated each episode with medications, therapy, work restrictions or complete removal from work for several days to weeks based on the severity of his symptoms." Dr. Pye diagnosed herniated disc at L5-S1, myalgia, sciatica, right knee internal derangement, right ankle lesion and right medial femoral condyle lesion. He concluded:

"In my medical and surgical opinion [appellant's] lumbar herniated disc is being directly aggravated and exacerbated by performing the numerous tasks outlined above including driving postal vehicles. Despite working on restrictions at the current time he currently continues to require significant amounts of narcotic analgesics in order to obtain some pain relief."

By decision dated April 29, 2009, the Office denied appellant's claim for disability from January 8, 2005 through December 20, 2007 for a total of 1,682 hours as a result of his accepted employment injury.

Appellant requested reconsideration of the Office's April 29, 2009 decision on May 28, 2010. Dr. Pye submitted a work release note dated February 27, 2008 stating that

appellant was treated from August 14, 2006 and could work with restrictions. Appellant submitted several work release notes dated from August 14, 2006 through March 31, 2010 supporting intermittent periods of disability. He submitted MRI scans dated October 19, 2004 demonstrating a herniated disc at L5-S1, February 15, 2007 demonstrating L5-S1 disc herniation, February 24, 2009 which demonstrated a severely degenerated disc at L5-S1 and January 7, 2010 which demonstrated L5-S1 severely degenerated disc and osteophyte complex as well as posterior disc protrusion at L4-5.

On October 4, 2008 Dr. Pye stated that appellant was totally disabled from August 20, through September 7, 2007 due to osteochondral defects in his right knee and ankle.

In reports dated February 27, 2007 and April 30, 2010, Dr. Pye stated that he first examined appellant on August 14, 2006 due to severe back pain. He noted appellant's prior back claim in 2004 and stated that appellant's intermittent periods of disability were due to his chronic lumbar condition. Dr. Pye opined that appellant's underlying condition was aggravated and exacerbated by having to perform a variety of repetitive tasks such as walking, climbing stairs and sitting. He also attributed the aggravation of appellant's underlying condition to job requirements of twisting, bending, kneeling, pushing, pulling and carrying up to 60 pounds as well as driving. Dr. Pye repeated his statement that appellant's herniated disc was aggravated by work activities and driving. He noted that appellant continued to require work restrictions to limit kneeling, stooping, squatting and twisting, pushing, pulling, lifting and carrying to 15 pounds as well as prolonged walking, stair climbing and standing. Appellant also submitted medical evidence relating to his right knee.

By decision dated June 18, 2010, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request was not timely filed and the evidence submitted was not sufficient to establish clear evidence of error on the part of the Office. It noted that he had submitted multiple pieces of medical evidence and that the evidence submitted did not establish that his condition was severe enough to warrant disability from work on the dates alleged.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Act<sup>2</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought."<sup>3</sup> In *Leon D. Faidley, Jr.*,<sup>4</sup> the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict the Office from performing a

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> 41 ECAB 104, 111 (1989).

limited review of any evidence submitted by a claimant with an untimely application for reconsideration. The Office is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of the Office thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of the Office.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>10</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.<sup>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

### ANALYSIS

The Board finds that the June 18, 2010 refusal of the Office to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 is appropriate. As more than one year elapsed between the April 29, 2009 merit decision and the May 28, 2010 request for reconsideration appellant's request for reconsideration was untimely.

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<sup>5</sup> 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>6</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *See Jesus D. Sanchez*, *supra* note 5.

<sup>9</sup> *See Leona N. Travis*, *supra* note 7.

<sup>10</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>12</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

The Board must evaluate whether appellant submitted clear evidence of error in the Office's decision denying his claim for intermittent periods of disability due to his accepted condition of aggravation of displacement of lumbar intervertebral disc without myelopathy. The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.<sup>13</sup> Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>14</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>15</sup> The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>16</sup>

The evidence submitted in support of appellant's request for reconsideration consists largely of a series of notes indicating that he was disabled for work for a specified period of time. These notes do not provide any findings or other evidence supporting that the periods of disability alleged are due to an aggravation of his underlying back condition as accepted by the Office. Without medical evidence regarding the specific reason that appellant was unable to work these notes do not raise a substantial question concerning the correctness of the Office's decision and are insufficient to establish clear evidence of error.

Appellant also submitted several MRI scans demonstrating his preexisting condition of herniated disc. These reports do not provide evidence of a specific period of disability and do not offer any medical reasoning explaining why appellant was disabled for work during the periods claimed. As such the MRI scans are not sufficient to establish clear evidence of error on the part of the Office.

Appellant submitted reports from Dr. Pye regarding the onset of his condition and alleging that his employment duties aggravated his underlying disc herniation. While this evidence does provide some indication that appellant's employment activities contributed to his periodic intermittent disability for work, Dr. Pye did not provide specific dates of disability in these reports. Without comprehensive medical evidence establishing specific periods of disability and relating that disability to the condition accepted by the Office, these reports are not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.

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<sup>13</sup> 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

<sup>14</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

The Board finds that appellant has not submitted the necessary evidence to establish clear evidence of error and that therefore the Office properly declined to reopen his claim. The Board further finds that, contrary to his argument on appeal, the Office adequately considered the medical evidence he submitted with his request for reconsideration and properly determined that this evidence was not sufficient to meet his burden of proving clear evidence of error.

**CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely and did not establish clear evidence of error therefore not warranting further consideration of his claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board